

The Tribunal of Tomorrow

Social Media in Tribunal Proceedings

Evidentiary & Case Management Challenges

The Rules of Evidence as tools for
dealing with social media
information as “evidence”

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Social Media “Evidence”

- Social Media, such as Facebook, Twitter, MySpace, LinkedIn and YouTube:-
 - can be defined as tools and platforms used to communicate, interact and share information with others online
 - allow users to create identities online and disclose information about themselves, and to communicate more generally
 - are an unruly new source of information about people and their activities
- Social Media therefore contains information – but does that make it evidence?

What is “evidence”?

- *“Evidence consists of the testimony, hearsay, documents, things and facts which a court [and tribunal] will accept as evidence of the facts in issue in a given case”*

Cross on Evidence, 8th Australian Edition, J.D. Heydon, p 13 [1075]

- Information can only be used as “*evidence*” if it is capable of being accepted to prove something

Social Media information as good “evidence”

- Social Media information is a potentially potent source of reliable evidence
- Information can be recorded right at the time of a particular event, when it is fresh in the mind of the person recording it
- The information may be the best record available as at a particular date and time, as to such things as:-
 - whether an event actually happened
 - what happened, where and when and who was there
 - a person’s health or state of mind, and any connection to a particular event – was someone really sick, depressed, unhappy or distressed due to an event?
 - Whether someone really did see a person or event
 - Whether someone really has been somewhere, or been there at a particular time

Social Media information as bad “evidence”

- Social Media information is also a potentially potent source of false or unreliable evidence, due to such things as:-
 - identity theft – even with photographs, is a Facebook page genuine, or is it just a parody page, or even a fraudulent site?
 - Second hand hearsay – the writer was not even a witness and has been told everything recorded by someone else
 - Malicious falsehoods, including for revenge
 - Exaggeration, embellishment or self-aggrandisement
- How can a tribunal sort out the good from the bad?

“Evidence” vs Rules of Evidence

- Important distinction between the Rules of Evidence and the “evidence” itself – the tool and the potential product
- The Rules of Evidence determine what information should be included as evidence and what should be excluded
- The Rules of Evidence historically operated to exclude certain information from becoming evidence – if it is not admitted, it is not evidence
- In more recent times, those rules have developed to help admit new sources of information as evidence and to assess it

But the Rules of Evidence don't apply?

- It is almost 80 years, since Evatt J said in *R v War Pensions Entitlement Appeal Tribunal; Ex parte Bott* (1933) 50 CLR 228 at 256:-

“Some stress has been laid by the present respondents upon the provision that the Tribunal is not, in the hearing of appeals, “bound by any rules of evidence.” Neither it is. But this does not mean that all rules of evidence may be ignored as of no account. After all, they represent the attempt made, through many generations, to evolve a method of inquiry best calculated to prevent error and elicit truth. No tribunal can, without grave danger of injustice, set them on one side and resort to methods of inquiry which necessarily advantage one party and necessarily disadvantage the opposing party.”

- **Bott** was concerned with a statutory requirement to administer “*substantial justice*” – in one form or another, that requirement exists for all courts and tribunals, including in relation to procedural fairness (which is not part of the Rules of Evidence)

Dealing with Social Media “evidence”

- Social media information, presented as potential evidence, has to be managed rationally, consistently, fairly and transparently by courts and tribunals in making decisions
- In courts, the legislated and common law Rules of Evidence help to deal with:-
 - Distilling large volumes of information into admissible evidence
 - Deciding what information to accept and what to reject and why
 - Once accepted, deciding what weight to give it
 - Working out how to manage & supplement evidence, such as by the application of “*common knowledge*” rules
- The rationale and reasoning of the Rules of Evidence can be applied as well by tribunals in relation to social media information evidence

Use of the Rules of Evidence

- Social media information will be put before a tribunal in documentary form, as printouts or electronic documents
- The Rules of Evidence for dealing with documentary evidence, even if not legally required to be applied by tribunals:-
 - can help in making reasoned decisions as to whether to allow particular material to be used at all
 - can be a helpful tool for weighing & assessing what is admitted
 - can provide a clearer framework for reasons, especially written reasons
 - thereby help an unsuccessful party to understand better why they have failed
 - facilitate procedural fairness

The 3 “Rs” of evidence

- Relevance
- Reliability
- Residual discretions (includes fairness, undue waste of time, public policy)
- These 3 Rs can be applied in whatever order is most efficient for the case at hand – but usually relevance comes first
- They are tools to help a tribunal determine what should be admitted and what weight it should be given

Relevance

- Relevance, in its strict legal sense, keeps evidence focused – just asking a party “*what is the relevance of X?*” can help the tribunal decide whether the information is of any use to the proceedings
- Definition: s 55(1), *Evidence Act 1995*:- “*The evidence that is relevant in a proceeding is evidence that, if it were accepted, could rationally affect (directly or indirectly) the assessment of the probability of the existence of a fact in issue in the proceedings.*”
- Does the information relate in some way to a **fact in issue** in the proceedings? What is the issue (including credit)?
- How could the information rationally make a difference to resolving that issue?

Reliability

- A key problem with reliability of documentary evidence is hearsay – it cannot be directly tested by asking questions of the person who created the record of information
- The record of Social Media information sought to be used as evidence will usually be sought to be used for a hearsay purpose – to prove the truth of what is recorded
- Definition of hearsay: - *“Evidence of a previous representation made by a person is not admissible to prove the existence of a fact that it can reasonably be supposed that the person intended to assert by the representation”* (s 59(1), Evidence Act 1995)
- *“**previous representation** means a representation made otherwise than in the course of evidence in the proceedings in which the evidence of the representation is sought to be adduced”* (Evidence Act 1995, Dictionary, Part 1 – definitions)

Relevant exceptions to the hearsay rule

- Exceptions to the hearsay rule all operate on the basis that there is a sound reason why the hearsay assertion may be able to be trusted without further testing
- The use of the language and reasoning of the hearsay exceptions can help to work out the value of social media information as evidence
- While the Rules of Evidence may not apply to require social media information to be excluded as evidence, they may be useful in deciding it should not be admitted or cannot be relied upon:-
 - **Non-hearsay purpose** – not to prove the truth (s 60) – may be relied upon to prove that something was said, not that it was true (e.g., that a person dislikes someone else by saying things about them that may not be true, or has a particular attitude towards them)

Relevant exceptions to the hearsay rule (cont)

- **Contemporaneous** statements about **health, feelings, sensations, intention, knowledge or state of mind** (s 66A) – e.g., what someone says about being happy, sad, angry may be relevant, if it was said at the time
- **Business records** – if created for the purposes of a business, it will be more likely to be reliable, but the reasoning is useful for assessing any documentary records – come back to this in more detail
- **Electronic communications** (s 71) – covers identity of sender, date and time of the communication, and destination (addressee) – the date and time of a post, blog etc – essentially a rebuttable presumption of accuracy
- **Admissions** (s 81) – something recorded by a party which is contrary to the case they are now running (e.g., entry, post, blog)

Section 69, Evidence Act 1995 - Business records

- The business records rules are useful because they provide a structure for assessing documentary evidence
- Key issues for the use of business records exception reasoning to social media information tendered as evidence:-
 - Was the record kept for a purpose which makes it reliable? Usually the day-to-day running of the business requires accurate records, but this does not directly apply to social media evidence, unless, e.g., a Facebook page kept by and for a business. “*Business*” includes government and charities.

Business records (Cont.)

- There may be a reason for accuracy in what is recorded, even if not for a “*business*” purpose. What is it about the social media information that makes its content reliable, so as not to require the writer instead to give direct evidence of what has been recorded? The answer might be one of the other exceptions, such as admissions.
- Can you be satisfied that the purported social media information is authentic? Did it really come from the person it purports to have come from? Is it really from a social media site at all, or is it possibly a forgery?
- Did the person who created the post, blog, etc, have any personal knowledge of what is being said? If they are describing an event, were they present?
- Was it created with litigation in mind, so as to be an unreliable tailoring of the description of events?

Tools for assessing social media information

Section 183, Evidence Act 1995: inferences

“If a question arises about the application of a provision of this Act in relation to a document or thing, the court may:

(a) examine the document or thing, and

(b) draw any reasonable inferences from it as well as from other matters from which inferences may properly be drawn.”

- Courts can make assessments on the face of social media information to decide whether it can be accepted as evidence, and how much weight to attach to it if admitted
- The fact that the Rules of Evidence do not apply is no barrier to a tribunal doing this as well – it is simply rational evaluation of information to make decisions about its worth

The last “R” – Residual discretions

“135 General discretion to exclude evidence

The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might:

- (a) be unfairly prejudicial to a party, or*
- (b) be misleading or confusing, or*
- (c) cause or result in undue waste of time.”*

- Section 135 allows a court to put aside a swathe of evidence that cannot help in the proceedings
- Even if the Rules of Evidence do not apply, a tribunal can apply the same sort of reasoning in deciding whether to accept evidence and how much weight to give to it

Evidence summaries

- Courts encourage parties to summarise voluminous or complex documentary evidence
- Even if the Rules of Evidence do apply, those rules provide useful means of organising large volumes of social media information, or material which is complex
- Section 50 of the *Evidence Act 1995* provides a useful regime for making sure:-
 - a summary is accurate
 - that the person who created it is identified (so that they can be asked about it); and
 - that there is a chance for the other party to check the summary for accuracy and completeness

Common knowledge

- Courts use common knowledge rules for bypassing the Rules of Evidence and for evaluating evidence
- Section 144(1) of the Evidence Act provides that proof is not required about knowledge that is not reasonably open to question, is common knowledge or is capable of verification by reference to a document the authority of which cannot reasonably be questioned.
- Section 144(4) of the Evidence Act provides that a court must give a party an opportunity to make submissions about knowledge acquired of that kind
- Section 144 permits courts to use a wide range of reliable resource materials to be used to check facts & assertions contained in evidence, including social media information evidence, provided it is transparent – tribunals can carefully do the same.